

NO. 35864-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HERM DOUMA, MIKE DOUMA, MJD FARMS L.L.C., RICHARD M.
STEPHENS and POLLUTION CONTROL HEARINGS BOARD,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and
POLLUTION CONTROL HEARINGS BOARD,

Respondents.

**AMENDED BRIEF OF RESPONDENT/CROSS APPELLANT
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY**

ROBERT M. MCKENNA
Attorney General

RONALD L. LAVIGNE
Assistant Attorney General
WSBA #18550
PO Box 40117
Olympia, WA 98504
360-586-6751

10/02/8 wd

07/11/01
STATE OF
BY: [Signature]
DEPT. OF
ECOL. &
POLL. CONTROL
HEARINGS BOARD
JUL 11 2001

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR AND ISSUE RELATING TO ASSIGNMENT OF ERROR BY THE SUPERIOR COURT	1
	A. Assignment of Error.....	1
	B. Issue Pertaining to Assignment of Error	2
III.	ASSIGNMENT OF ERROR AND ISSUE RELATING TO ASSIGNMENT OF ERROR BY THE PCHB.....	2
	A. Assignment of Error.....	2
	B. Issue Relating to Assignment of Error.....	2
IV.	STATEMENT OF THE CASE	2
V.	ARGUMENT	6
	A. Standard And Scope Of Review.	6
	B. RCW 90.64.030(6) Does Not Shield The Doumas From Enforcement For Their Unauthorized Discharge Of Dairy Waste Into Waters Of The State Of Washington.....	8
	C. There Is No Basis For An Additional Penalty Reduction.....	19
	D. The Board Erred In Suspending A Portion Of The Gravity Component Of The Penalty.	38
	E. The Board Erred In Reducing The Economic Benefit Component Of The Penalty.	41
VI.	CONCLUSION	44

TABLE OF AUTHORITIES

Cases

<i>Amberson Egg Farm v. Ecology</i> , PCHB No. 99-029 (July 16, 1999)	32
<i>Atlantic States Legal Found., Inc., v. Tyson Foods, Inc.</i> , 897 F.2d 1128, (11th Cir. 1990)	27
<i>Citizens For a Better Environment-California v. Union Oil Co of California</i> , 83 F.3d 1111 (9th Cir. 1996)	41
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	7
<i>Community Ass'n for Restoration of Environment v. Henry Bosma Dairy</i> , No. CY-98-3011, 2001 WL 1704240 (E.D. Wash. 2001)	27
<i>Dale DeBoer dba Borderview Dairy v. Ecology</i> , PCHB No. 99-107 (Jan. 28, 2000).....	31
<i>Douma v. Ecology</i> , PCHB No. 00-019 (Mar. 30, 2005)	2
<i>Heutink Pumping Service, LLC v. Ecology</i> , PCHB No. 99-130 (Apr. 6, 2000).....	14
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	7
<i>Tapper v. Employment Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	6

Statutes

RCW 34.05.570	6
RCW 34.05.570(3)(d)	7
RCW 34.05.570(3)(e)	7
RCW 43.21B.010.....	7
RCW 90.48.020	5, 9, 10
RCW 90.48.080	<i>passim</i>
RCW 90.48.120(1).....	22
RCW 90.48.144	8, 39, 41
RCW 90.48.144(3).....	8, 25, 28
RCW 90.48.160	32
RCW 90.64.010(18).....	9
RCW 90.64.010(18)(a)	9
RCW 90.64.010(18)(a)(i).....	9
RCW 90.64.010(18)(a)(ii)	9, 24
RCW 90.64.020	14
RCW 90.64.020(1).....	16, 17
RCW 90.64.020(1)(a)	17
RCW 90.64.020(1)(b)	18
RCW 90.64.020(1)(c)	18
RCW 90.64.020(1)(d)	18

RCW 90.64.030(6).....	<i>passim</i>
RCW 90.64.030(9).....	9, 12, 13
RCW 90.64.120(1).....	9, 11

I. INTRODUCTION

This appeal involves a civil penalty assessed against dairy farmers who pumped a half million gallons of dairy waste into an unlined trench they had constructed on state owned land and allowed the waste to remain in the trench for over two months until an anonymous tip led state officials to discover the trench. The unlined trench was constructed in permeable soils in an area where the groundwater was very close to the surface, and, as a result, the dairy waste polluted groundwater for the entire time it was in the trench. In this appeal, the Department of Ecology (“Ecology”) asks the Court to reverse the Pollution Control Hearings Board’s ruling reducing the penalty Ecology assessed against the Doumas for their unpermitted discharge of dairy waste into waters of the state of Washington. Ecology asks this Court to fully affirm the penalty Ecology assessed and to reject Appellants’ request for a further penalty reduction.

II. ASSIGNMENT OF ERROR AND ISSUE RELATING TO ASSIGNMENT OF ERROR BY THE SUPERIOR COURT

A. Assignment of Error

The Superior Court erred in issuing its Judgment on Petition for Judicial Review.

B. Issue Pertaining to Assignment of Error

Did the Court erroneously conclude that the Pollution Control Hearings Board (“PCHB” or “Board”) had properly reduced the penalty assessed by Ecology?

**III. ASSIGNMENT OF ERROR AND ISSUE RELATING TO
ASSIGNMENT OF ERROR BY THE PCHB**

A. Assignment of Error

The PCHB erred in issuing its Findings of Fact, Conclusions of Law, and Order.

B. Issue Relating to Assignment of Error

Did the PCHB erroneously reduce the penalty assessed by Ecology?

IV. STATEMENT OF THE CASE

The Doumas operate one of the largest dairy farms in Whatcom County. Testimony of Andrew Craig, Report of Proceedings (“RP”) at 51:20-21.¹ Waste from over 2,000 cows at the dairy is collected and stored in manure lagoons and applied to field crops during the growing season. *Douma v. Ecology*, PCHB No. 00-019 (Mar. 30, 2005) Findings of Fact, Conclusions of Law, and Order (“PCHB Order”) at Finding of

¹ Citations to the Report of Proceedings refer to the Transcript of Proceedings before the PCHB and include the page number followed by the appropriate line or lines.

Fact 1. During the end of 1998 and beginning of 1999, the area around the Doumas' dairy received higher than normal levels of precipitation. *Id.* The Doumas' manure lagoons filled more quickly than normal and the Doumas felt they were going to be in trouble with Ecology and might be fined and identified in the newspaper. *Id.*; RP at 153:18-20.

The manure lagoons at other dairies in the area also filled more quickly than normal and these other dairies contacted either Ecology or the Natural Resource Conservation Service to find solutions that would prevent their manure lagoons from overflowing. PCHB Order at Findings of Fact 1 and 16. The Doumas decided to take matters into their own hands, and, on or about February 25, 1999, constructed an unlined trench on wooded land adjacent to their dairy. *Id.* at Finding of Fact 2. The Department of Natural Resources ("DNR") managed the wooded land as School Trust Land and leased it to the Doumas. *Id.* at Finding of Fact 2; RP at 18:20-25. The Doumas' lease with DNR did not authorize any use of the wooded parcel. RP at 20-21:23-2. The rectangular trench constructed by the Doumas' excavation contractor was approximately 550 feet long on each side, between five and ten feet wide and three to six feet in depth. PCHB Order at Finding of Fact 2. Once the unlined trench was constructed, the Doumas proceeded to pump approximately 500,000

gallons of dairy waste into the trench, a volume of waste roughly equivalent to ten days of dairy waste production at the Doumas' dairy. *Id.*

The Doumas' lease with DNR not only prohibited the storage of harmful substances on the wooded parcel, but also required immediate notification to the state of any spill or release of a harmful substance that affected the leased land. DNR Lease No. 12-A66425, Exhibit ("Ex.") R-1 at 6.10, pp. 5-6. Nonetheless, after pumping the dairy waste into the unlined trench, the Doumas took no further action related to the dairy waste in the trench and failed to inform either DNR or Ecology that they had pumped 500,000 gallons of dairy waste into the unlined trench on DNR land. *Id.* at Finding of Fact 3 and Conclusion of Law 20. In late April 1999, DNR received an anonymous tip regarding the dairy waste in the trench and initiated an inspection. PCHB Order at Finding of Fact 3. DNR contacted Ecology regarding the trench on May 3, 1999, and Ecology officials inspected the site on May 5, 1999. *Id.*

During the May 5 inspection, Ecology inspector Andrew Craig dug a six to twelve inch hole near the trench. PCHB Order at Finding of Fact 5. The hole filled with water and Mr. Craig concluded that the water table was at the level of the dairy waste in the trench and that the dairy waste in the trench came in contact with groundwater. *Id.* Expert witnesses for both Ecology and the Doumas testified that some amount of

dairy waste seeped into the groundwater and into surficially perched water. *Id.* at Finding of Fact 14. Both groundwater and surficially perched water are waters of the state. *Id.* at Finding of Fact 12; *see also* RCW 90.48.020. The dairy waste in the unlined trench contained fecal coliform at 110,000 colonies per 100 ml. PCHB Order at Finding of Fact 13. The state standard for fecal coliform is 100 colonies per 100 ml. *Id.* The Doumas finally removed the dairy waste from the unlined trench on May 7 and 8, 1999, but only after being directed to do so by Ecology. *Id.* at Finding of Fact 5.

On August 20, 1999, Ecology issued a \$53,000 penalty to the Doumas for discharging pollutants into waters of the state of Washington without a discharge permit. Ex. R-11. The Doumas filed an Application for Relief from Penalty and Ecology subsequently affirmed the \$53,000 penalty in a Notice of Disposition dated November 29, 1999. Exs. R-12 and R-13. The Doumas appealed the Notice of Disposition to the PCHB. The PCHB held a hearing on the merits on December 20, 2004, and issued its Findings of Fact, Conclusions of Law, and Order on March 30, 2005.

The \$53,000 penalty Ecology assessed against the Doumas included a \$40,000 gravity component and a \$13,000 economic benefit component. PCHB Order at Conclusion of Law 21. The Board reduced the economic benefit component of the penalty to \$6,500 despite finding

that the receipts the Doumas produced at the hearing purporting to show what they paid to construct the unlined trench and pump waste into and out of the trench, failed to clearly establish the type of work, date of work, or amount paid for the work. *Id.* at Finding of Fact 8. The Board also suspended \$10,000 from the gravity component of the penalty despite its conclusions that the Douma case was unique in that it involved a knowing discharge of dairy waste to groundwater for over two months before being discovered by Ecology and that the gravity component of the penalty could have been higher than the \$40,000 assessed by Ecology. *Id.* at Conclusions of Law 18 and 21. The Doumas and Ecology both filed Petitions for Review of the PCHB Order and both Petitions were consolidated in Thurston County Superior Court. The superior court affirmed the PCHB Order and both parties now seek review by this Court.

V. ARGUMENT

A. Standard And Scope Of Review

This appeal involves judicial review of an agency decision under RCW 34.05.570. “In reviewing administrative action, [the] court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 498, 858 P.2d 494 (1993). The Court may reverse the PCHB if the Court finds that the PCHB has erroneously

interpreted or applied the law. RCW 34.05.570(3)(d). The Court may also reverse the PCHB if its Order is not supported by substantial evidence. RCW 34.05.570(3)(e). The Court reviews the PCHB's Conclusions of Law de novo and is not bound by the PCHB's interpretation of a statute. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

The purpose of the Board is to review decisions made by Ecology. RCW 43.21B.010. The Legislature has entrusted Ecology with the administration of the State Water Pollution Control Act and Ecology's interpretation of the laws it administers is therefore entitled to great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004). The Board cannot change a penalty or add conditions to a penalty simply because it feels such conditions would make the penalty better. *Id.* at 592 (PCHB cannot add conditions to an Ecology issued certification simply because it feels such conditions would make the certification better). Rather, Ecology's interpretation of Chapter 90.48 RCW is entitled to deference and the Board cannot reduce a penalty established by Ecology or add new conditions to a penalty unless the Board concludes that Ecology's penalty determination is incorrect in a particular respect. *Id.* The issuance of civil penalties for violations of

water pollution laws is governed by RCW 90.48.144. Penalties “shall be set in consideration of the previous history of the violator and the severity of the violation’s impact on public health and/or the environment in addition to other relevant factors.” RCW 90.48.144(3). Nowhere in the PCHB Order does the Board conclude that Ecology improperly applied the statutory factors in establishing the penalty assessed against the Doumas. The Board’s decision to reduce and suspend portions of the penalty is based on an erroneous interpretation and application of the law and should be reversed. In addition, the Board’s decision to reduce and suspend portions of the penalty is not based on substantial evidence and should be reversed.

B. RCW 90.64.030(6) Does Not Shield The Doumas From Enforcement For Their Unauthorized Discharge Of Dairy Waste Into Waters Of The State Of Washington

The Water Pollution Control Act is codified at Chapter 90.48 RCW. This statute makes it unlawful to “cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged . . . any organic or inorganic matter that shall cause or tend to cause pollution” of waters of the state. RCW 90.48.080. Pollution is broadly defined to include the “contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in

temperature, taste, color, turbidity, or odor of the waters, or such discharge . . . as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious[.]” RCW 90.48.020.

The Dairy Nutrient Management Act is codified at Chapter 90.64 RCW. This statute defines a violation to include the “discharge of pollutants into the waters of the state[.]” RCW 90.64.010(18)(a). It is not a violation if a discharge is due to a chronic or catastrophic event and the dairy producer has complied with all the elements of a dairy nutrient management plan. RCW 90.64.010(18)(a)(i) and (ii). A discharge to surface waters of the state is not considered a violation of Chapters 90.64 or 90.48 and is therefore not subject to enforcement “if at the time of the discharge, a violation is not occurring under RCW 90.64.010(18).” RCW 90.64.030(9). A discharge that is a violation under RCW 90.64.010(18) is subject to enforcement because nothing in Chapter 90.64 RCW affects Ecology’s authority “to administer the provisions of chapter 90.48 RCW.” RCW 90.64.120(1). Consequently, a discharge of pollutants by a dairy that has not fully implemented a dairy nutrient management plan is subject to enforcement. In addition, a dairy “that is determined to be a significant contributor of pollution” is also subject to enforcement. RCW 90.64.030(6).

The Doumas do not contest the fact that they discharged dairy waste into the groundwater beneath the unlined trench they constructed on trust land managed by the DNR.² Nor do the Doumas contest the fact that they did not have a discharge permit to authorize the discharge of their dairy waste into groundwater.³ Rather, the Doumas contend their unauthorized discharge of dairy waste into waters of the state of Washington is shielded from enforcement because, according to the Doumas, their farm was not “determined to be a significant contributor of pollution” under RCW 90.64.030(6).⁴ The Doumas’ argument is wrong for at least three reasons. First, RCW 90.64.030(6) is not the enforcement shield the Doumas contend it is and the Doumas fail to meet the limited enforcement shield the Legislature did provide in Chapter 90.64 RCW. Second, even if RCW 90.64.030(6) did provide the enforcement shield the Doumas claim, Ecology determined the Doumas’ farm was a significant contributor of pollution before the Doumas placed half a million gallons of

² Pursuant to RCW 90.48.080, it is unlawful to allow any matter that “shall cause or tend to cause pollution” to seep into waters of the state. Groundwater, or “underground waters”, are waters of the state. RCW 90.48.020. Pollution is any contamination of a water of the state that “will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare[.]” *Id.*

³ Pursuant to RCW 90.48.160, it is unlawful for any commercial or industrial operation to dispose of solid or liquid waste material into waters of the state without a discharge permit.

⁴ RCW 90.64.030(6) provides:

A dairy farm that is determined to be a significant contributor of pollution based on actual water quality tests, photographs, or other pertinent information is subject to the provisions of this chapter and to the enforcement provisions of chapters 43.05 and 90.48 RCW, including civil penalties levied under RCW 90.48.144.

dairy waste into the unlined trench on DNR land. Third, even if Ecology had not determined that the Douma's farm was a significant contributor of pollution prior to the discharge from the unlined trench, the discharge itself made the Doumas a significant contributor of pollution.

The Doumas argue that under RCW 90.64.030(6) only those dairies "determined to be a significant contributor of pollution" are subject to enforcement action under Chapter 90.48 RCW. Appellants' Opening Br. at 6. While a dairy that is a significant contributor of pollution is clearly subject to enforcement action under Chapter 90.48 RCW, there is nothing in RCW 90.64.030(6), nor anywhere else in Chapter 90.64 RCW, that suggests enforcement action is limited to those dairies determined to be significant contributors of pollution. In fact, in RCW 90.64.120(1), the Legislature specifically provided that "[n]othing in this chapter shall affect the department of ecology's authority . . . to administer . . . the provisions of Chapter 90.48 RCW."

The fact that the Legislature provided for enforcement against those dairies determined to be significant contributors of pollution does not indicate an intent to limit enforcement to only those dairies determined to be significant contributors of pollution. If that were the Legislature's intent, the legislature would have inserted the word "only" at the beginning of RCW 90.64.030(6). To the contrary, the Legislature

specifically provided that nothing in Chapter 90.64 RCW would affect Ecology's authority to administer Chapter 90.48 RCW.

When the Legislature chose to limit enforcement against dairies, the Legislature used words that clearly demonstrated this intent. For example, under RCW 90.64.030(9):

A discharge...to surface waters of the state shall not be considered a violation of this chapter, chapter 90.48 RCW, or chapter 173-201A WAC, and shall therefore not be enforceable by the department of ecology or a third party, if at the time of the discharge, a violation is not occurring under RCW 90.64.010(18). In addition, a dairy producer shall not be held liable for violations of this chapter, chapter 90.48 RCW, chapter 173-201A WAC, or the federal clean water act due to the discharge of dairy nutrients to waters of the state resulting from spreading these materials on lands other than where the nutrients were generated, when the nutrients are spread by persons other than the dairy producer or the dairy producer's agent.

This case does not involve a discharge "to surface waters of the state," so the limitation in the first sentence of RCW 90.64.030(6) does not apply. This case arguably involves the "spreading" of dairy nutrients on lands other than where the nutrients were generated since the Doumas pumped 500,000 gallons of dairy waste from their lagoon into the unlined trench on the DNR trust land. However, there is no dispute that the "spreading" was done by the Doumas and/or their agent. PCHB Order at Finding of Fact 2 (Doumas hired excavation company to construct unlined trench and 500,000 gallons of dairy waste were pumped into trench from

manure lagoons); *see also* RP at 154-155:22-10 (Doumas hired Stremmler Gravel to dig trench and put manure from lagoons into trench as soon as they were done). Consequently, the limitation in the second sentence of RCW 90.64.030(9) also does not apply to the Doumas.

The language in RCW 90.64.030(9) indicates a specific legislative intent that particular discharges into waters of the state would not be subject to enforcement. Discharges other than those identified in RCW 90.64.030(9), such as the discharges involved in this case, are subject to enforcement. In addition, RCW 90.64.030(6) subjects a dairy farm to enforcement action if the dairy farm is determined to be a significant contributor of pollution. If the Legislature had intended RCW 90.64.030(6) to be the exclusive source of enforcement authority against dairies, as alleged by the Doumas, the Legislature would have said that “only” a dairy determined to be a significant contributor of pollution would be subject to enforcement. However, the Legislature did not limit enforcement to only those dairies determined to be a significant contributor of pollution. The Doumas are asking the Court to rewrite RCW 90.64.030(6) by inserting the word “only” into the statute. The Doumas are also asking the Court to ignore the language of RCW 90.64.030(9). The Court should reject the Doumas’ invitation to rewrite RCW 90.64.030(6) and ignore RCW 90.64.030(9).

Even if RCW 90.64.030(6) provided the enforcement shield the Doumas contend it does, Ecology determined that the Doumas were a significant contributor of pollution before the Doumas placed a half million gallons of dairy waste into the unlined trench on DNR land. In a letter dated February 17, 1999, Ecology advised the Doumas that water quality violations Ecology had observed at the Doumas' dairy on December 31, 1998, met the violation criteria described in Chapter 90.64 RCW and the dairy was therefore being designated as a Concentrated Dairy Animal Feeding Operation and was required to obtain coverage under the Dairy Farm National Pollutant Discharge Elimination System and State Waste Discharge General Permit. *See* Ex. R-21. Under RCW 90.64.020 Ecology may only designate a dairy operation as a Concentrated Dairy Animal Feeding Operation "upon determining that it is a significant contributor of pollution to the surface or ground waters of the state." Ecology's determination on February 17, 1999, that the Doumas' dairy was a Concentrated Dairy Animal Feeding Operation constituted a finding that the dairy was a significant contributor of pollution. *Accord Heutink Pumping Service, LLC v. Ecology*, PCHB No. 99-130 (Apr. 6, 2000), Conclusion of Law IV (requiring a permit represents Ecology's determination that a farm is a significant contributor of pollution).

Ecology's February 17, 1999, determination that the Douma dairy was a Concentrated Animal Feeding Operation was an appealable decision and included specific directions on how an appeal could be filed before the Board. *See* Ex. R-21. However, the Doumas elected not to appeal Ecology's determination. Consequently, when the Doumas dug an unlined trench on DNR's land and pumped 500,000 gallons of dairy waste into the unlined trench on February 25, 1999, the Doumas' dairy had already been determined to be a significant contributor of pollution. In addition, the Doumas were a significant contributor of pollution when they discharged dairy waste into groundwater following their placement of half a million gallons of dairy waste into the unlined trench.

The Doumas incorrectly argue that water quality tests are necessary before a dairy can be determined to be a significant contributor of pollution. However, RCW 90.64.030(6) indicates the significant contributor determination can be based on "water quality tests, photographs, or other pertinent information[.]" Water quality tests are not required to make a significant contributor determination. In this case, it was not possible for Ecology to obtain groundwater samples to assess the impact of the Doumas' illegal activity because the Doumas placed their dairy waste into the unlined trench on February 25, 1999, and effectively concealed their activity from Ecology for over two months. It was only

after an anonymous informant advised DNR of the unlined trench in the woods, and DNR in turn advised Ecology of the trench in early May 1999, that Ecology even knew that the trench existed.

At the time of its initial inspection of the unlined trench, Ecology did take samples of the manure in the trench and determined that the manure greatly exceeded the state's water quality standards for fecal coliform bacteria. PCHB Order at Finding of Fact 13. Ecology inspectors also dug into the soils near the unlined trench to determine that the water table was at the level of the dairy waste in the trench, and that the dairy waste in the trench came in contact with groundwater. *Id.* at Findings of Fact 11, 12, and 14.

While the Legislature has not defined the term "significant contributor of pollution", the Legislature has provided factors to consider in determining whether a dairy operation is a significant contributor of pollution. RCW 90.64.020(1). Among the factors to be considered are the size of the animal feeding operation, the amount of waste reaching waters of the state, the location of the animal feeding operation relative to waters of the state, the means of conveyance of animal waste and process waters into the waters of the state, the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal waste and process wastewaters into the waters of the state. *Id.* Only one of these

factors relates to the amount of waste reaching waters of the state. Consequently, a dairy could be deemed a significant contributor of pollution even if Ecology was unable to determine the amount of waste reaching waters of the state. This is especially important in the current case where the Doumas successfully concealed their illegal activity from Ecology and prevented Ecology from being able to determine how much waste had reached the groundwater during the months that the Doumas allowed dairy waste to sit in the unlined trench.

Applying the factors set out in RCW 90.64.020(1) demonstrates that the Doumas' decision to place a half million gallons of dairy waste into an unlined trench, and allow the waste to remain in the trench for over two months, made the Doumas a significant contributor of pollution to waters of the state. RCW 90.64.020(1)(a) requires consideration of the "size of the animal feeding operation and the amount of wastes reaching waters of the state[.]" The Doumas' dairy is one of the largest dairies in Whatcom County. RP at 51:20-25. While the Doumas' successful concealment of their illegal activity for over two months made it impossible to determine the amount of waste that reached state waters, the half million gallons of dairy waste the Doumas put into the unlined trench was a substantial amount of waste, equivalent to ten days of waste production at the dairy. PCHB Order at Finding of Fact 2.

RCW 90.64.020(1)(b) requires consideration of the “location of the animal feeding operation relative to waters of the state[.]” The location of the unlined trench was at, or near, the level of groundwater. PCHB Order at Finding of Fact 5. RCW 90.64.020(1)(c) requires consideration of the “means of conveyance of animal wastes and process waters into the waters of the state[.]” The Doumas’ dairy waste was conveyed from the unlined trench into waters of the state by percolation through the permeable soils into groundwater that was at the level of the dairy waste in the trench. PCHB Order at Findings of Fact 5 and 11. RCW 90.64.020(1)(d) requires consideration of the “slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into the waters of the state[.]” The lack of vegetation in the trench, rainfall after the trench was constructed, and the construction of the trench in permeable soils in close proximity to groundwater were all factors that affected the likelihood and frequency of animal waste discharges into groundwater via the unlined trench.

Despite the Doumas’ successful effort to conceal the amount of waste they discharged to groundwaters of the state, the Doumas’ activity between February and May 1999 made the Doumas significant contributors of pollution. More importantly, the Doumas did more than significantly contribute to the pollution of state waters, the Doumas

actually caused pollution in violation of RCW 90.48.080. Since Ecology proved that the Dumas actually caused pollution in violation of RCW 90.48.080, it was not necessary for either Ecology or the Board to determine that the Dumas' dairy was a significant contributor of pollution. Even if such a determination were required, Ecology had made the significant contributor determination over a week prior to the Dumas' decision to pump 500,000 gallons of dairy waste into the unlined trench. Moreover, the Dumas' construction of the unlined trench, placement of half a million gallons of dairy waste into the trench, and concealment of their activities from all regulatory agencies for several months, made the Dumas significant contributors of pollution. For all these reasons, the Court should deny the Dumas' invitation to rewrite Chapter 90.64 RCW to provide them with an enforcement shield for their deliberate and intentional violations of this state's environmental laws.

C. There Is No Basis For An Additional Penalty Reduction

The Dumas contend they are entitled to an even greater penalty reduction than the reduction the Board has already given them. However, there is no basis for an additional penalty reduction, and, as discussed below, the Board erred in suspending a portion of the gravity component of the penalty and in reducing the economic benefit component of the penalty.

With respect to the Board's analysis of the penalty amount, the Doudas first argue that the Board failed to recognize that the Doudas were simply responding to an emergency and that the evidence was undisputed that, had the Doudas not taken the action for which they were penalized (discharging dairy waste to groundwater via an unlined trench), the manure lagoons would have overflowed into a stream. Appellants' Opening Br.at 16. In making this argument, the Doudas ignore the fact that Ecology Inspector Andrew Craig testified at length regarding Ecology's work with other farmers during the winter and spring of 1998/1999 who also had concerns regarding potential overflows of manure lagoons but were able to address their concerns without pumping dairy waste into an unlined trench. RP at 73-76. Mr. Craig testified at length regarding Ecology's cooperative efforts with the Whatcom County Conservation District and area dairy farmers to find ways to reduce manure lagoons enough to prevent the manure lagoons from overflowing and reaching surface waters. *Id.* In particular, Ecology and the Conservation District identified areas with soils that could accept a small amount of manure that was applied in a manner to minimize run-off to surface waters. *Id.* at 75. Ecology also worked with local dairy farmers to find farmers who had additional storage capacity and were willing to take manure from other farmers on a temporary basis to keep lagoons from

overflowing. *Id.* at 75-76. Ecology and the Conservation District also identified former dairy farms that had old lagoons that were not being used and that could accept temporary storage of manure from lagoons at risk of overflowing. *Id.* at 76. Finally, Mr. Craig testified that he would have been able to offer similar assistance to the Doumas had the Doumas contacted Ecology prior to making the unilateral decision to pump half a million gallons of dairy waste into an unlined trench. *Id.*

The Doumas are simply incorrect when they represent to this Court that they had no choice other than to pump 500,000 gallons of dairy waste into the unlined trench. Like other dairy farmers in the area, the Doumas could have contacted either Ecology or the Whatcom County Conservation District to find solutions that would have protected their lagoon and protected the environment at the same time. Instead, the Doumas elected to take matters into their own hands and created a situation that allowed their dairy waste to contaminate groundwater for over two months because the Doumas were concerned about receiving a fine and the resulting bad publicity. RP at 153:17-20 (Mike Douma testified “we knew that we were in trouble. We’re going to be fined, put all over the newspaper, it’s not going to be good.”)

The Doumas next argue there was no evidence that fully implementing recommendations in their farm plan to prevent barn roof

water from filling up the manure lagoon would have prevented the manure lagoon from being in danger of overflowing. Appellants' Opening Br. at 16-17. In making this argument, the Doumas ignore both their own statements to Ecology as well as the testimony of Inspector Craig before the Board.

On May 21, 1999, Ecology issued a Notice of Violation to the Doumas, pursuant to RCW 90.48.120(1), for the Doumas' illegal discharge of pollutants into waters of the state via the unlined trench. Ex. R-8. The Doumas responded to the Notice of Violation by letter dated June 21, 1999. Ex. R-9. In response to Ecology's request that the Doumas explain the circumstances leading to the construction of the unlined trench, the Doumas admitted "the gutter system on most of the barns causes water to divert into the lagoon. This is being changed presently." *Id.* at 3. Consequently, by the Doumas' own admission, one of the reasons why the manure lagoon at their farm was in danger of overflowing was because the Doumas had failed to implement the recommendation in their 1995 farm plan that they remove barn roof water from the manure lagoon. *See* Ex. R-2 at 1 (Specific recommendations to hook up rain gutters and drain uncontaminated water to the nearest ditch. Specifically noting that the "existing situation is not entirely kosher should the DOE inspect."). By the Doumas' own admission, as of June 21, 1999,

the gutter system on “most of the barns” still diverted water to the manure lagoon.

In addition to the Doulas’ admission, Inspector Andrew Craig testified at length regarding Ecology’s concerns about barn gutters diverting water to lagoons. RP at 79-82. In particular, Mr. Craig testified that when a farmer puts clean water from barn roofs into a lagoon that is designed to hold manure, the farmer is taking up space in the lagoon with clean water rather than using that space for the storage of manure. *Id.* at 79:7-18. Since barn roof water is essentially clean rainwater, most farm plans, such as the Doulas’ 1995 farm plan, recommend preventing roof or gutter water from going to manure lagoons and instead routing that water to a surface water body. *Id.* at 79:18-25. When Mr. Craig was asked whether the Doulas’ failure to route their roof water away from the lagoon contributed to the storage problems the Doulas experienced in February of 1999, Mr. Craig responded “[c]ertainly, with all of the rain that was falling at that time period, not separating your roof water from going into your lagoons would definitely cut out how much storage you would have.” *Id.* at 80:5-8.

Mr. Craig went on to testify that most dairy farmers disconnected their roof gutters from their manure lagoons within three to six months of receiving a recommendation to do so. *Id.* at 82:1-8. The Natural

Resources Conservation Service first recommended that the Doumas disconnect their rain gutters from their manure lagoon in the conservation plan prepared for the Doumas on April 19, 1995. *See* Ex. R-2. As of June 21, 1999, the Doumas informed the Department of Ecology that “the gutter system on most of the barns causes water to divert into the lagoon.” Ex. R-9 at 3. While most farmers disconnected roof gutters from their lagoons in three to six months, the Doumas failed to complete this task in over four years. Mr. Craig had never run across another farmer who had failed to complete this simple remedial measure over a four year period. RP at 82:9-11. Contrary to the Doumas’ argument before this Court, there was significant evidence before the Board that indicated the Doumas’ failure to remove their barn roof water from the manure lagoon contributed to the manure storage problems the Doumas experienced in February 1999.⁵

⁵ The Doumas not only failed to fully implement their 1995 farm plan, but also failed to update the plan to account for increases in their herd size. The 1995 farm plan was designed for 1,800 mature cows (1,500 milking cows and 300 dry cows) as well as 400 heifers, for a total of 2,200 animals. Ex. R-2 at 4 (Herd Inventory). When the Doumas submitted their permit application dated February 22, 1999 to Ecology, the Doumas indicated they had 2,100 mature cows and 800 heifers, for a total of 2,900 animals. Ex. R-20 at 2, Section C (Current Herd Size). Given the Doumas’ failure to fully implement the 1995 farm plan, and their failure to update the plan to account for their increased herd size, the Board properly considered the Doumas’ failure to implement the farm plan in evaluating the reasonableness of the penalty. In addition, an unpermitted discharge of pollutants to waters of the state is a violation under RCW 90.64.010(18)(a)(ii) unless the dairy has complied with all elements of a nutrient management plan that is commensurate with the dairy producers’ current herd size.

The Doumas next argue that the Board improperly considered the fact that the Doumas failed to inform Ecology, DNR, or any other agency of the situation with their manure lagoons and the unlined trench in the woods. Appellants' Opening Br. at 17. According to the Doumas, since they had no legal obligation to contact any state agency, it was improper for the Board to consider the Doumas' failure to contact any state agency in evaluating the reasonableness of the penalty. *Id.* However, the Doumas' lease with DNR prohibited the storage of any substance subject to regulation as harmful by any federal, state, or local law, or regulation or ordinance. Ex. R-1 ¶ 6.10.2.a, p. 5. The DNR lease specifically required the Doumas to "immediately notify the State of any spill or release of any Hazardous Substance affecting the premises[.]" *Id.* ¶ 6.10.2.b(1), p. 6.⁶ Consequently, the Doumas had an obligation to immediately notify the state of the release of dairy waste into the unlined trench on DNR's property. Moreover, RCW 90.48.144(3) directs that penalties be set in consideration of "the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors." In this case, it was appropriate for the Board to

⁶ Under the terms of the lease, "Hazardous Substances" includes hazardous, toxic, dangerous, or harmful substances that are subject to regulation by any federal, state, or local law, regulation, statute, or ordinance. *Id.* The Doumas' dairy waste is a "Hazardous Substance" under the lease because dairy waste is a harmful substance subject to regulation under Chapter 90.64 RCW.

contrast the Doumas' decision to take matters into their own hands with other dairy farmers in the Whatcom County area who contacted Ecology and/or the Whatcom County Conservation District to work out solutions that addressed manure storage problems in an environmentally responsible manner. It was a legitimate "relevant factor" for the Board to compare the Doumas' response to their manure storage problems with the manner in which other dairy farmers addressed their manure storage problems. Consequently, the Board properly considered the Doumas' failure to notify regulatory agencies of their manure storage problems in evaluating the reasonableness of the penalty.⁷

The Doumas next argue that the Board's analysis of the reasonableness of the penalty was flawed because the Board compared the actual penalty Ecology imposed with the maximum penalty that could have been imposed. Appellants' Opening Br. at 18. However, analogous cases from federal courts evaluating penalties under the federal Clean Water Act have held that an analysis of the appropriate penalty amount for a water pollution violation should begin with an analysis of the maximum

⁷ The Doumas' failure to notify Ecology about their manure storage problems is particularly noteworthy given the fact that the Doumas submitted a permit application to Ecology dated February 22, 1999, a mere three days before the Doumas constructed the unlined trench and pumped 500,000 gallons of dairy waste into the trench. Ex. R-20. The permit application specifically asked whether manure was discharged to waters of the state through a man-made ditch and the Doumas answered this question in the negative. *Id.* at 2, Section F (Discharge of Pollutants).

authorized statutory penalty and consider what, if any, deviations from that penalty is authorized by the specific facts of a particular case. In *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140 (11th Cir. 1990), the District Court for the Northern District of Alabama refused to assess a penalty against Tyson Foods because the court believed Tyson had “acted in good faith” in responding to violations of the Clean Water Act. The Court of Appeals held “that the district court committed an error of law by failing to assess civil penalties in some amount.” *Id.* at 1142. The Court of Appeals provided the following instructions to the district court:

Upon remand, the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in [33 U.S.C.] section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions.

Id. See also *Community Ass’n for Restoration of Environment v. Henry Bosma Dairy*, No. CY-98-3011, 2001 WL 1704240 at 8 (E.D. Wash. 2001) (Applying the *Atlantic States* “top down” analysis to evaluate the appropriate Clean Water Act penalty against a Washington dairy farmer).

In evaluating the reasonableness of the \$53,000 penalty Ecology assessed against the Doumas, it was appropriate for the Board to consider the fact that Ecology could have penalized the Doumas \$10,000 per day

for each of the 69 days the dairy waste remained in the trench, for a total penalty of \$690,000. *See* PCHB Order at Conclusion of Law 21. *See also* RCW 90.48.144(3) (every day of a continuing violation is a separate and distinct violation). The Board was reviewing the reasonableness of a penalty that Ecology had already cut by more than 90 percent of the penalty that could have been assessed. If the Board believed a further penalty reduction was necessary, the Board was required to apply the factors specified in RCW 90.48.144(3), indicating the weight it gave to each factor and the factual findings that support the Board's conclusion. As argued below, if the Board had properly applied the required statutory factors and not substituted its judgment for Ecology's, the Board would have fully affirmed the \$53,000 penalty Ecology assessed against the Dumas.

The Dumas next argue that the Board failed to consider the seriousness of the violation. Appellants' Opening Br. at 18. In making this argument, the Dumas attempt to take advantage of the fact that their successful concealment of the dairy waste in the unlined trench prevented Ecology from taking groundwater samples during February, March, and April 1999. When information from an anonymous informant led to Ecology's discovery of the trench, Ecology took water quality samples of the dairy waste in the trench. PCHB Order at Finding of Fact 13. These

samples indicated that the dairy waste in the trench had levels of fecal coliform bacteria that greatly exceeded Washington's water quality standards. *Id.* At the same time, Ecology determined that the groundwater in the area of the trench was located within six to twelve inches of the trench itself. *Id.* at Finding of Fact 5. Groundwater experts for both the Doumas and Ecology testified that some amount of waste from the trench was discharged into groundwater. *Id.* at Finding of Fact 14. The fact that the penalty issued by Ecology was a tiny fraction of the penalty that could have been assessed indicates that Ecology already considered the inability to clearly establish the impact on public health and/or the environment when Ecology set the penalty.

During his testimony, Inspector Craig testified regarding his preparation of a recommendation for enforcement, a document that the Board admitted as Exhibit R-10. RP at 82-83. The recommendation for enforcement includes a penalty matrix that inspectors use to develop an objective recommendation for penalty assessments. *Id.* at 84. The penalty matrix includes a series of seven questions that are rated on a scale from zero to three. Ex. R-10 at 4. The total score is then used to determine the appropriate gravity component of a penalty. *Id.* The higher the score in the penalty matrix, the higher the resulting gravity component of the penalty. *Id.* Questions 1 and 2 in the penalty matrix ask whether there

was a public health risk or environmental damage as a result of the violation. *Id.* As Inspector Craig testified, Ecology assigned a score of one to public health risk since it was “possible” that a public health risk existed given the permeable soils where the trench was dug and the proximity of the trench to groundwater. RP at 84-85:18-9; PCHB Order at Finding of Fact 11. Ecology assigned a score of two to environmental damage because it was “probable” that the nitrogen and bacteria contaminants in the dairy waste had damaged the aquifer that was in close proximity to the unlined trench. RP at 85:10-18; PCHB Order at Findings of Fact 11 and 13.

The Board specifically considered the low scores Ecology assigned to public health and environmental damage in the penalty matrix and concluded that the low scores were appropriate. PCHB Order at Conclusion of Law 17. While the Board erred in suspending \$10,000 of the gravity component of the penalty, the Board did not err in refusing to further mitigate a penalty Ecology had already substantially mitigated based in part on Ecology’s inability to take groundwater samples as a result of the Doumas’ successful concealment of their illegal activity.

The Doumas incorrectly argue that the alleged harshness of the penalty assessed against them is evident from reviewing other “similar cases” before the Board. Appellants’ Opening Br. at 19. This argument

ignores the Board's conclusion that most dairy water quality cases before the Board involved accidental pollution of surface waters, while the Douma case was "a unique case in which the discharge of dairy waste was done knowingly to groundwater and for a duration of over two months before discovery by Ecology." PCHB Order at Conclusion of Law 18. Inspector Andrew Craig testified that prior to his May 1999 inspection of the Doumas' farm, he had conducted at least 100 inspections of different dairy farms and had never seen a situation where another commercial dairy farmer had constructed an unlined trench as a strategy for handling manure waste. RP at 72-73:15-5. The Douma case is fundamentally different than other cases heard by the Board, and the cases cited by the Doumas are not "similar cases." Moreover, the Doumas have misrepresented the holding of one of the cases they cite and have failed to fully and accurately explain the holding of another cited case.

The Doumas allege that *Dale DeBoer dba Borderview Dairy v. Ecology*, PCHB No. 99-107 (Jan. 28, 2000) involved an appeal of a \$43,500 penalty issued by Ecology that the Board subsequently reduced to \$20,000. Appellants' Opening Br. at 19. In fact, the *DeBoer* case involved an appeal of a \$20,000 penalty assessed by Ecology and fully affirmed by the Board upon finding that *DeBoer* violated RCW 90.48.080

and RCW 90.48.160.⁸ As discussed above, Ecology significantly reduced the maximum penalty Ecology could have assessed against the Doumas. By contrast, Ecology assessed the maximum penalty against DeBoer and the Board fully affirmed that penalty. *DeBoer*, PCHB No. 99-107, at Finding of Fact 8 and Order. The *DeBoer* case not only supports Ecology's argument that a dairy is subject to civil penalties for violating RCW 90.48.080 and RCW 90.48.160 without a determination that the dairy is a significant contributor of pollution, but also supports Ecology's argument that the Board erred when it reduced the penalty against the Doumas without sufficient justification to do so. As it did in the *DeBoer* case, the Board should have fully affirmed the penalty Ecology assessed against the Doumas.

The Doumas also cite *Amberson Egg Farm v. Ecology*, PCHB No. 99-029 (July 16, 1999) to support their argument that the penalty assessed against them was overly harsh. Appellants' Opening Br. at 19. As the Doumas correctly note, the Board reduced the \$21,000 penalty to \$10,000, and suspended that penalty in its entirety on the condition that Mr. Amberson not violate the Water Pollution Control Act for one year.

⁸ A true and correct copy of the *DeBoer* case is attached hereto for the Court's convenience. In *DeBoer*, Ecology originally assessed a \$43,500 penalty, but reduced that penalty to \$20,000 which was the maximum penalty Ecology could assess for the two violations that occurred on one day. *DeBoer v. Ecology*, PCHB No. 99-107, Findings of Fact 8. The appeal before the Board was Mr. DeBoer's appeal of the \$20,000 penalty.

However, on appeal to Thurston County Superior Court, the Honorable Judge Tabor reversed the Board's decision and held that Mr. Amberson must pay a penalty of \$10,000, and suspended \$11,000 of the penalty on the condition that Mr. Amberson not violate the conditions of the Water Pollution Control Act for a period of one year.⁹ In his decision reversing the Board, Judge Tabor specifically found that the Board exceeded its authority when it reduced the penalty assessed against Mr. Amberson without "any reason other than saying it was giving Amberson Egg Farm the benefit of the doubt. This is an insufficient basis for reducing the \$21,000 penalty assessed by Ecology." Judgment on Petition for Judicial Review at 2, ll. 17-20. Unfortunately, the Board committed the same error in the present case by reducing the economic benefit portion of the penalty assessed against the Doumas despite the lack of sufficient evidence to do so, and by suspending \$10,000 of the gravity portion of the penalty without any reason whatsoever other than the Board's citation to some unidentified testimony regarding compliance efforts at the dairy. PCHB Order at Conclusion of Law 23. As the superior court did in the *Amberson* case, this Court should reverse the Board's decision to reduce and suspend a portion of the penalty assessed against the Doumas because the Board

⁹ A true and correct copy of Judge Tabor's order reversing the Board is attached hereto for the Court's convenience.

failed to articulate a legal basis for concluding that Ecology's penalty determination was incorrect.

The Doumas argue that the Board should have reduced the economic benefit portion of the penalty by more than \$6,500. Appellants' Opening Br. at 20. However, it was error for the Board to reduce the economic benefit portion of the penalty at all because the Doumas failed to provide any evidence that clearly established any cost they may have incurred in constructing the trench or pumping dairy waste into the trench. PCHB Order at Finding of Fact 8 ("The receipts provided by the Doumas do not clearly establish the type of work, date of work, and amount paid, though there is no dispute that the Doumas did pay for excavation and pumping services."). Given Finding of Fact 8, there was no basis to support the Board's conclusion that testimony on the costs of having the dairy waste pumped and removed from the dairy indicated that the \$13,000 economic benefit calculation was about twice as high as it should have been. PCHB Order at Conclusion of Law 21. The only evidence on the cost of having dairy waste pumped and removed from the Doumas' dairy were the receipts provided by the Doumas, which the Board specifically found "do not clearly establish the type of work, date of work, and amount paid." The Court should not only reject the Doumas' request for an additional reduction of the economic benefit component of the

penalty, but should reverse the Board's unsubstantiated conclusion that the economic benefit portion of the penalty should have been reduced at all.

The Doumas argue that the Board should have reduced the penalty in consideration of the Doumas' prior history because the penalty at issue in this case was the first time the Doumas had been penalized. Appellants' Opening Br. at 21. However, the Doumas fail to inform the Court that they have an extensive history of failing to properly manage their dairy waste, dating back to 1995. On May 25, 1995, Ecology Inspector Belinda Hovde sent a letter to the Doumas to follow up on an inspection she had conducted on April 26, 1995. Ex. R-18. During her inspection, Ms. Hovde "observed that your manure waste storage pond (the northwest cell) was overtopping with manure wastewater which was flowing down the sides of this northwest cell and pooling in your field and then discharging into the Enterprise Road ditch which is tributary to the South Fork of Dakota Creek." *Id.* at 1. On April 3, 1996, Ms. Hovde again sent a warning letter to the Doumas following up on her February 7, 1996 inspection. Ex. R-19. While Ms. Hovde observed that the Doumas had reinforced the walls of their manure waste storage ponds to prevent overtopping, she also noted that "your four manure pond cells were quite full and within 1/2 foot of the top edge of the pond wall." *Id.* at 1. On April 24, 1997, the Environmental Protection Agency ("EPA") issued a

warning letter to the Doumas following a March 12, 1997 inspection of their dairy. Ex. R-16. The first area of concern noted in EPA's warning letter was that the wastewater level in the Doumas' manure storage lagoon was observed to be at its capacity. *Id.* at 1. On February 17, 1999, Ecology Inspector Mark Kaufman sent a letter to the Doumas following up on a December 31, 1998 inspection of their dairy. Ex. R-21. Mr. Kaufman noted that during his inspection he observed polluted runoff leaving the Doumas' property from a puddle of contaminated water near one of the Doumas' manure lagoons. *Id.* at 1.

Contrary to the Doumas' argument that the penalty assessed against them should have been further reduced based on their prior history, the evidence before the Board indicated that, beginning in 1995, the Doumas failed to properly manage their dairy waste during the spring and winter months of 1995, 1996, 1997, and 1998. *See* Exs. R-18, R-19, R-16, and R-21. When the Doumas again failed to properly manage their dairy waste during the winter of 1999, they constructed an unlined trench in woods owned by DNR and pumped half a million gallons of dairy waste into the unlined trench. The Doumas' poor history in properly managing their dairy waste is not a basis for a further penalty reduction, as urged by the Doumas. To the contrary, had the Board properly considered the Doumas' past history, the Board would have fully affirmed the penalty

assessed by Ecology given the Doumas' significant history of failing to properly manage their dairy waste.

Finally, the Doumas argue that the Board should have granted a further penalty reduction because the Doumas removed the dairy waste from the unlined trench after being directed to do so by Ecology. Appellants' Opening Br. at 21-22. However, the Doumas ignore the fact that Ecology had already reduced the penalty in recognition of the fact that the Doumas removed the dairy waste from the unlined trench after being directed to do so by Ecology. The recommendation for enforcement Ecology prepared prior to issuing the penalty includes a question in the penalty matrix that asks whether the violator was unresponsive in correcting the violation. Ex. R-10 at 4. Ecology assigned a score of zero to this question because Inspector Craig felt the Doumas were responsive in addressing the violation by eventually removing the manure from the trench. *Id.* at 4; RP at 86:4-18. Given the fact that Ecology had already recognized the remedial action taken by the Doumas in removing dairy waste from the trench after being directed to do so by Ecology, the Board properly refused to further mitigate the penalty simply because the Doumas complied with Ecology's request to remove the dairy waste from the unlined trench.

The Doumas' argument that the penalty should be waived in this instance is meritless given the fact that Ecology and EPA consistently waived penalties for violations observed in 1995, 1996, 1997, and 1998. *See* Exs. R-18, R-19, R-16, and R-21. The waiver of penalties appears to have simply encouraged the Doumas to ignore their obligation to properly manage dairy waste. The willful discharge of dairy waste into groundwater through the construction of an unlined trench in woods owned by DNR demonstrates the type of callous disregard for the state's environmental laws that warrants a significant penalty. There is no justification for another penalty waiver in this case.

D. The Board Erred In Suspending A Portion Of The Gravity Component Of The Penalty

The Board improperly concluded that \$10,000 from the \$40,000 gravity component of the penalty should be suspended on the conditions that the Doumas obtain technical assistance to review their dairy nutrient management practices, implement any recommendations, and not have any water quality violations for a period of two years from the date of the PCHB Order. PCHB Order at 21. The Board's decision to suspend a portion of the penalty was based on some unidentified testimony "regarding compliance efforts at the Doumas' dairy" that the Board believed justified the suspension. *Id.* at Conclusion of Law 23.

Ecology's interpretation of RCW 90.48.144 is entitled to deference and the Board cannot reduce a penalty established by Ecology or add new conditions to a penalty unless the Board concludes that Ecology's penalty determination is incorrect in a particular respect. *Port of Seattle*, 151 Wn.2d at 592. Nowhere in the PCHB Order does the Board conclude that Ecology improperly applied the statutory factors in establishing the penalty assessed against the Doumas. To the contrary, the Board properly concluded that the gravity portion of the penalty could have been higher if the maximum statutory penalty of \$10,000 per day had been assessed, or if a penalty had been assessed for each of the 69 days that dairy waste remained in the unlined trench. PCHB Order at Conclusion of Law 21. If Ecology had assessed the maximum statutory penalty of \$10,000 per day for each of the 69 days the dairy waste remained in the trench, the penalty would have been \$690,000 instead of \$53,000. Other than its citation to unidentified testimony "regarding compliance efforts at the Doumas' dairy," the PCHB Order provides no basis to justify its decision to suspend a portion of a penalty that Ecology had already significantly reduced by issuing a penalty that was much smaller than the penalty Ecology could have issued. To the contrary, the PCHB Order indicates that the penalty should have been fully affirmed.

As the Board properly concluded, the Douma case was “a unique case in which the discharge of dairy waste was done knowingly, to groundwater, and for a duration of over two months before discovery by Ecology.” PCHB Order at Conclusion of Law 18. The Board also properly concluded that the violations the Doulas were penalized for were the result of a situation that was of the Doulas’ own making because the Doulas failed to implement recommendations to prevent barn roof water from filling up manure lagoons, and because the Doulas could have worked with Ecology and other agencies but chose not to. *Id.* at Conclusion of Law 20. By contrast, other dairies in the area contacted Ecology or the Natural Resource Conservation Service (“NRCS”) during the winter of 1999 regarding possible manure lagoon overflows due to the high precipitation and were able to work with the agencies to find solutions that included land application of dairy waste and sharing of lagoon space. *Id.* at Finding of Fact 16. *See also* RP at 73-76:20-21.

In summary, the Doulas ignored technical assistance they had previously received that encouraged them to prevent barn roof water from filling up their manure lagoons, did not contact Ecology, NRCS, or any other agency to seek assistance in addressing the lack of capacity at their manure lagoon and, instead, knowingly discharged dairy waste to groundwater for over two months while they concealed their actions from

all regulatory agencies. In response, Ecology issued a penalty that was a tiny fraction of the penalty that could have been issued under RCW 90.48.144. Under these facts, there is no legal basis to support the Board's conclusion to suspend \$10,000 of the penalty. Consequently, the Court should reverse the Board's decision to suspend \$10,000 from the gravity component of the penalty.

E. The Board Erred In Reducing The Economic Benefit Component Of The Penalty

The economic benefit component of a penalty is intended to capture any economic benefit a violator realizes as a result of his or her violation and thereby ensure that a violator does not achieve an economic benefit as a result of his or her violation of environmental laws. *See Citizens For a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111, 1116 (9th Cir. 1996). In this case, Ecology determined how much manure the Doumas pumped into the unlined trench and determined what it would have cost to apply that manure to fields instead of pumping it into the trench. RP at 91:10-14. After contacting two commercial pumping operators active in Whatcom County, Ecology concluded it would have cost the Doumas \$13,000 to apply the manure to fields rather than pumping it into the unlined trench. *Id.* at 11:14-22.

At the PCHB hearing, the Doumas submitted an exhibit that purported to show what the Doumas paid to construct the unlined trench, pump manure into the trench, and pump manure out of the trench. Ex. A-4. The Board specifically found that the “receipts provided by the Doumas do not clearly establish the type of work, date of work, and amount paid, though there is no dispute that the Doumas did pay for excavation and pumping services.” PCHB Order at Finding of Fact 8. The Board went on to conclude that the \$13,000 economic benefit calculation was about twice as high as it should have been based on testimony regarding the cost of having dairy waste pumped and removed from the Doumas’ dairy. *Id.* at Conclusion of Law 21. However, in the same Conclusion of Law, the Board concluded that the Doumas “are not entitled to any credit for funds spent in constructing the trench or having the dairy waste pumped.” *Id.* Nonetheless, the Board cut the economic benefit portion of the penalty in half, reducing it from \$13,000 to \$6,500. *Id.* Conclusion of Law 21 is not only internally inconsistent, it also is not supported by the evidence before the Board.

After Ecology established that the Doumas saved \$13,000 by pumping their manure into an unlined trench rather than having it properly applied to fields, the burden shifted to the Doumas to present clear and convincing evidence that the economic benefit realized as a result of their

illegal activity was something other than \$13,000. The Doumas did not contest Ecology's conclusion that it would have cost \$13,000 to properly apply the 500,000 gallons of dairy waste to fields. Rather, the Doumas attempted to establish what they had spent to construct the unlined trench and pump dairy waste into and out of the trench in an attempt to establish that the economic benefit of their illegal activity was something less than \$13,000. The Doumas introduced a series of receipts that the Board specifically found "do not clearly establish the type of work, date of work, and amount pai[d]." PCHB Order at Finding of Fact 8. Given the Doumas' failure to establish the type of work they had paid for, when the work was done, and what they had paid for the work, the Board should have fully affirmed the \$13,000 economic benefit component of the penalty. Instead, the Board speculated that the \$13,000 economic benefit component of the penalty was about twice as high as it should have been, concluded that the Doumas were not entitled to any credit for funds spent in constructing the unlined trench or having the dairy waste pumped, and proceeded to reduced the economic benefit calculation from \$13,000 to \$6,500 "[b]ased on testimony on the costs of the [sic] having dairy waste pumped and removed from the Doumas [sic] dairy[.]" *Id.* at Conclusion of Law 21. The Court should reverse the Board's decision to reduce the economic benefit component of the penalty from \$13,000 to \$6,500

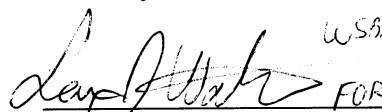
because the Board failed to identify a valid basis for the reduction and the reduction was not justified by the evidence before the Board.

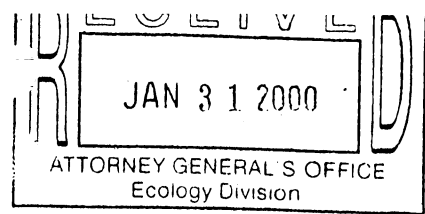
VI. CONCLUSION

For the reasons discussed above, the Court should reject the Doumas' invitation to further reduce the penalty. Instead, the Court should reverse the PCHB Order suspending a portion of the gravity component of the penalty and reducing the economic benefit portion of the penalty. Ecology respectfully requests that the Court fully affirm the \$53,000 penalty Ecology assessed against the Doumas.

RESPECTFULLY SUBMITTED this 20th day of August, 2007.

ROBERT M. McKENNA
Attorney General

 WSBA 28452
FOR
RONALD L. LAVIGNE
WSBA #18550
Assistant Attorney General
Attorneys for Petitioner
State of Washington
Department of Ecology



1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **DALE DEBOER dba BORDERVIEW**)
4 **DAIRY,**)
5 Appellants,)
6 v.)
7 **STATE OF WASHINGTON,**)
8 **DEPARTMENT OF ECOLOGY,**)
 Respondent.)
 _____)

PCHB NO. 99-107

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

9 This matter arises from the appeal of a \$20,000 penalty assessed by the Department of
10 Ecology ("Ecology") against Dale DeBoer, doing business as Borderview Dairy. A hearing on
11 the matter was held on October 26, 1999 in the Lynden, Washington. Administrative Appeals
12 Judge, Phyllis K. Macleod, presided for the Board. The Board was comprised of members Ann
13 Daley and Robert V. Jensen. James A. Tupper, Jr. recused himself from the proceedings.
14 Sandra Sullivan, of Corpolongo & Quelch, Inc., Bellingham, Washington, recorded the hearing.

15 Lesa Starkenburg-Kroontje represented the appellant and Ecology was represented by
16 Assistant Attorney General Ken Lederman.

17 The Board received the sworn testimony of witnesses, admitted exhibits and heard
18 arguments on behalf of the parties. Having fully considered this record, the Board enters the
19 following
20

**FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB NO. 99-107 (1)**

1 FINDINGS OF FACT

2 I.

3 Dale DeBoer is the operator of the Borderview Dairy located at 9779 Jackman Road,
4 Lynden, Washington. The farm consists of approximately one hundred acres supporting a herd
5 of 150 cows. The fields are planted in grass and the cows are kept confined, rather than
6 pastured. Mr. DeBoer was raised on the farm and took over the responsibility for operations in
7 1984.

8 II.

9 On November 11, 1998 Ecology Inspector Mark Allen Kaufmann inspected Borderview
10 Dairy. The inspection noted the need for a gutter repair and commented that the manure
11 lagoons were full. This was a serious problem because the winter months were approaching
12 and there was no capacity to store the waste generated before the proper manure application
13 season. General instructions for emergency winter applications were conveyed to Mr. DeBoer
14 indicating that manure was to be applied only during dry periods. During the November
15 inspection Mr. DeBoer was informed that he needed to obtain a National Pollution Discharge
16 Elimination System permit as a confined dairy animal feeding operation. Mr. DeBoer did make
17 application for such a permit but as of December 15, 1998 it had not been issued.

18 III.

19 On December 15, 1998 Ecology received complaints that manure was being applied by
20 spray gun on the Borderview Dairy. Mr. Kaufmann responded to the scene and observed
manure application in progress despite rainy conditions. The field being sprayed was saturated

1 and could not absorb the manure. The liquid was flowing across the ground. This field was
2 separated from a drainage ditch by a foot to foot and a half high berm. The drainage ditch
3 flows into Bertrand Creek, a stream tributary to the Nooksack River.

4 IV.

5 Manure contaminated water was leaving the field and entering this ditch through a hole
6 in the berm that appears to have been created by an animal. The contaminated water was
7 creating a green plume in the receiving waters. Mr. DeBoer took action to repair this hole and
8 the direct discharge was ceased.

9 V.

10 Mr. Kaufmann took water samples at five locations to determine the nature and extent
1 of the discharge. The water sample results showed the following counts per 100 ml of water:

12 #1 Ditch west of DeBoers	81,000 fecal coliform colonies
13 #2 West ditch confluence with DeBoer ditch	68,000 fecal coliform colonies
14 #3 North ditch adjacent to spray field	1,200,000 fecal coliform colonies
15 #4 Runoff leading to north ditch	2,400,000 fecal coliform colonies
16 #5 Northside ditch upstream	2,100 fecal coliform colonies

17 The state standard for fecal coliform colonies is 100 per 100 ml of water.

18 VI.

19 The discharge that occurred on December 15, 1998 at Borderview Dairy was a result of
20 poor overall management of dairy waste. Since the manure lagoons had no capacity to accept

1 the waste being generated, it became critical to reduce the level. Mr. DeBoer chose to do this
2 by applying manure to a saturated field during rainy conditions. This application created a
3 source of contamination that was allowed to enter the stream through the unfortunate
4 intervention of an animal.

5 VII.

6 Borderview Dairy has a history of ongoing dairy waste management problems. The
7 United State Environmental Protection Agency (EPA) assessed a penalty against the farm in
8 1997 for a water quality violation. The penalty was resolved pursuant to a consent order
9 through a payment plan totaling \$12,500. Due to financial hardship Mr. DeBoer has operated
10 the farm the past few years personally with only the help of one hired man. He has not been
11 able to complete all the tasks necessary to properly manage his dairy waste.

12 VIII.

13 Based upon these facts, Ecology issued a civil penalty to Mr. DeBoer in the amount of
14 \$43,500. This was calculated by multiplying the EPA penalty by three and adding the new
15 penalty of \$6,000. Borderview requested relief from the penalty and Ecology responded with a
16 reduction to \$20,000. This adjustment was based upon the recognition that the maximum
17 penalty under RCW 90.48.144(3) for a single day water quality violation is \$10,000. In the
18 response to request for relief, Borderview was cited for the maximum amounts under two
19 separate sections of RCW 90.48.144 for the December 15 discharge. Mr. DeBoer timely
20 appealed the penalty to this Board where it was given PCHB No. 99-107.

IX.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From the foregoing Findings of Fact, the Board makes the following:

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the persons and subject matter of this appeal pursuant to RCW chapters 43.21B, 90.48, and 90.64.

II.

The Board's standard of review is de novo. Ecology bears the burden of proving by a preponderance of the evidence that the violations occurred and that the penalty is reasonable. WAC 371-08-485(2).

III.

RCW 90.48.080 prohibits the discharge into waters of the state any substance that shall cause or tend to cause pollution:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any waters of this state, or to cause, permit, or suffer to be thrown, run, drained, allowed to seep or to otherwise discharge into such waters any organic or inorganic matter than shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

IV.

Any person who violates RCW 90.48.080 is liable for a penalty of up to \$10,000 per day for each such violation. RCW 90.48.144.

1 V.

2 RCW 90.48.160 requires a permit for discharge of solid or liquid waste material into
3 waters of the state:

4 Any person who conducts a commercial or industrial operation of any
5 type which result in the disposal of solid or liquid waste material into
6 the waters of the state, including commercial or industrial operators
7 discharging solid or liquid waste material into sewerage systems
8 operated by municipalities or public entities which discharge into
9 public waters of the state, shall procure a permit from either the
10 department or the thermal power plant site evaluation council as
11 provided in RCW 90.48.262(2) before disposing of such waste
12 material. . .

9 VI.

10 A dairy farm that is found by the department to be a significant contributor of pollution,
11 based on actual water quality tests, photographs or other pertinent information is subject to the
12 enforcement provisions of Chapter 90.48 RCW, including civil penalties pursuant to RCW
13 90.48.144. RCW 90.64.030(3).

14 VII.

15 WAC 173-201A-030(2)(c)(I)(A) establishes the limit for fecal coliform organisms in
16 fresh water as not to exceed a geometric mean value of 100 organisms per 100 milliliters.
17 Laboratory analysis of water samples taken on December 15, 1998 confirmed an exceptionally
18 high exceedance of this standard.

VIII.

Water quality samples taken during the December 15, 1998 inspection confirm that water contaminated with large amounts of fecal coliform entered the ditch, which is properly considered a water of the state. No permit had been issued to authorize such a discharge. The facts meet Ecology's burden of proving that violations of RCW 90.48.080 and RCW 90.48.160 occurred.

IX.

We now turn to the question of the reasonableness of the \$20,000 penalty. The Board considers the reasonableness of a penalty on a de novo basis, taking into account (1) the nature of the violation, (2) the prior behavior of the violator, and (3) subsequent action taken to rectify the problem. Deskin Farms v. Department of Ecology, PCHB 98-073 (1998); Columbia Aluminum Corporation v. Ecology, PCHB 95-028 (1995).

X.

In this case the Borderview Dairy does have a history of past water quality violations. The EPA penalty was issued for a water quality violation. Mr. DeBoer was aware of proper manure handling practices, but did not follow them during 1998. The stage was set for a pollution discharge when the dairy failed to provide sufficient capacity in its lagoons for the anticipated waste to be generated during the winter months. Prompt action after the November inspection might have averted this discharge, but failure to act led to emergency application of manure in totally unsuitable conditions. While financial hardship is certainly a factor in Mr. DeBoer's action or inaction on the farm, the facts show general lack of response to the

1 importance of proper manure handling practices. After the discharge occurred, Mr. DeBoer
2 was responsive in repairing the berm, but the potential for damage created by his past inaction
3 had already been realized.

4 XI.

5 The serious nature of this offense cannot be overlooked. The discharge entering this
6 drainage ditch was over one million fecal coliforms per 100 ml of water. This is an
7 exceptionally high reading that remained extremely high even after a traveling a significant
8 distance in the ditch for dilution. Fecal coliform is a harmful pollutant that impacts the public
9 health, wildlife habitat and fish habitat. Dairy waste management plans and regulatory
10 standards exist to prevent just this type of damaging event.

11 XII.

12 The purpose of civil penalties is to influence behavior, promote compliance and to deter
13 future violations, both by the violator and by others in the same occupation. Robert V.
14 Lundvall v. Department of Ecology, PCHB 86-91 (1987); Coastal Tank Cleaning v.
15 Department of Ecology, PCHB 90-61 (1991).

16 XIII.

17 The circumstances of this case show a pattern of insufficient dairy waste management.
18 While financial hardship is a reality, steps to prevent discharge should have been taken if the
19 dairy was to continue in operation. A very significant discharge occurred as a direct result of
20 improper manure storage and application. The penalty of \$20,000 is supported by the record
and should be upheld.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

XIV.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

Based on the above Findings of Fact and Conclusions of Law, the Board enters the following :

ORDER

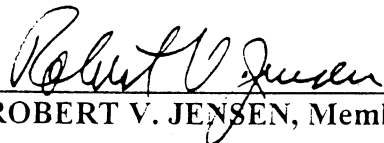
The findings that Dale DeBoer dba Borderview Dairy violated RCW 90.48.080 and RCW 90.48.160 are affirmed. The penalty assessed by Ecology is sustained in the amount of \$20,000.

DONE this 28th day of January 2000.

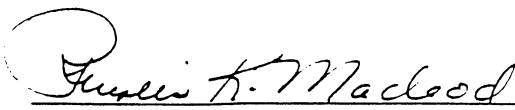
POLLUTION CONTROL HEARINGS BOARD



ANN DALEY, Chair



ROBERT V. JENSEN, Member



Phyllis K. Macleod
Administrative Appeals Judge, Presiding

FILED
SUPERIOR COURT
THURSTON COUNTY WA

2000 JUN 23 AM 10:52

BETTY J. GOULD, CLERK

BY _____
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Petitioner,

v.

AMBERSON EGG FARM,

Respondent.

NO. 99-2-01532-8

JUDGMENT ON PETITION FOR
JUDICIAL REVIEW

THIS MATTER came before the court on the State of Washington, Department of Ecology's ("Ecology") Petition for Judicial Review of a decision by the Pollution Control Hearings Board ("Board"). The matter before the Board was an appeal by Amberson Egg Farm of a \$21,000 penalty Ecology assessed against Amberson Egg Farm for the unauthorized discharge of pollutants into waters of the State of Washington. In its decision, the Board reduced the \$21,000 penalty to \$10,000, and suspended the \$10,000 penalty in its entirety "on the condition that Keith Amberson and Amberson Egg Farm not violate the provisions of the state Water Pollution Control Act from and within one year of the date of this order." The order was dated July 16, 1999.

Ecology timely appealed the Board's decision to this Court. The issue in this appeal is whether the Board erred in reducing the \$21,000 penalty to \$10,000 and suspending the \$10,000 penalty conditioned on no violations of the state Water Pollution Control Act for a one year period.

1 In reaching its decision, the Court considered Petitioner, Department of Ecology's Trial
2 Brief and the oral argument of Ecology and Amberson Egg Farm. Amberson Egg Farm elected
3 not to file a response brief and there was consequently no reply brief filed by Ecology.

4 Amberson Egg Farm clearly violated chapter 90.48 RCW on four separate occasions by
5 discharging manure into waters of the State of Washington.

6 Pursuant to RCW 90.48.144 (3) a penalty amount "shall be set in consideration of the
7 previous history of the violator and the severity of the violation's impact on public health and/or
8 the environment in addition to other relevant factors." While the Board properly reviewed the
9 previous history of the violator and properly concluded that the history of violations at
10 Amberson Egg Farm warranted a penalty, the Board failed to evaluate the severity of the
11 violation's impact on public health and/or the environment.

12 There is no question in this Court's mind but that there was a severe impact upon the
13 environment from the four violations. The severity of the impact on public health and the
14 environment is established over a period of many months with extremely high fecal coliform
15 readings in the water; and a situation that even according to the United States Department of
16 Agriculture was simply atrocious.

17 The Board exceeded its authority in determining that Ecology's assessment of a \$21,000
18 penalty should be reduced to \$10,000. The Board failed to provide any reason other than saying
19 it was giving Amberson Egg Farm the benefit of the doubt. This is an insufficient basis for
20 reducing the \$21,000 penalty assessed by Ecology.

21 The Board erred in suspending the entire assessed penalty. In fact, the Board lacked the
22 authority to suspend the entire penalty because RCW 90.48.144 requires a penalty whenever a
23 violation is established. The language of the statute recognizes that if someone is allowed to
24 violate the law without some penalty imposed, the law is really only a shell. The Board erred by
25 failing to properly apply RCW 90.48.144 to the assessed penalty.
26

1 In fashioning an appropriate penalty, wrongdoing must be punished, but consideration
2 should also be given to the ramifications of a penalty as far as rehabilitation is concerned. The
3 court concludes that \$11,000 of the penalty should be suspended on the condition that Keith
4 Amberson and Amberson Egg Farm not violate the provisions of the state Water Pollution
5 Control Act between July 16, 1999 and July 16, 2000. However, \$10,000 of the penalty shall not
6 be suspended. A \$10,000 penalty is direct punishment for violations that were clearly ongoing
7 for a period of time and of a severe nature.


8 Accordingly, it is hereby ORDERED, ADJUGED AND DECREED that the Board's
9 decision is reversed. The \$21,000 penalty was and is appropriate. Amberson Egg Farm shall
10 pay a penalty of \$10,000 dollars. The remaining \$11,000 of the \$21,000 penalty is suspended on
11 the condition that Keith Amberson and Amberson Egg Farm not violate the provisions of the
12 state Water Pollution Control Act from July 16, 1999 through July 16, 2000.

13 DONE IN OPEN COURT this 23 day June, 2000.

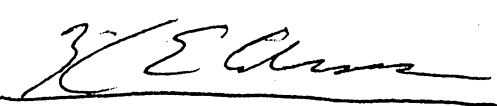
14
15 
The Honorable GARY R. TABOR, Judge

16 Presented By:

17 CHRISTINE O. GREGOIRE
18 Attorney General

19 
20 RONALD L. LAVIGNE, WSBA #18550
21 Assistant Attorney General
22 Washington State Department of Ecology

Approved as to form:

23 
24 Keith Amberson
25 Amberson Egg Farm
26

FILED
COURT OF APPEALS
DIVISION II

07 AUG 21 PM 1:29

STATE OF WASHINGTON

BY _____
DEPUTY

NO. No. 35864-4

(Thurston County Superior Court
Consolidated Nos. 05-2-00671-1 and 06-2-00784-8)

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,,

Appellant,

v.

HERM DOUMA, MIKE DOUMA,
MJD FARMS L.L.C., RICHARD M.
STEPHENS, and POLLUTION
CONTROL HEARINGS BOARD,

Respondents.

CERTIFICATE OF
SERVICE

HERM DOUMA, and MJD FARMS
L.L.C.,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
POLLUTION CONTROL HEARINGS
BOARD,

Respondents.

Pursuant to RCW 9A.72.085, I certify that on the 20th day of
August, 2007, I caused to be served the Amended Brief of

Respondent/Cross-Appellant State of Washington, Department of Ecology

in the above-captioned matter upon the parties herein as indicated below:

Richard M. Stephens	<input checked="" type="checkbox"/> U.S. Mail
Groen Stephens & Klinge LLP	<input type="checkbox"/> State Campus Mail
11100 NE 8th Street, Suite 750	<input type="checkbox"/> Hand Delivered
Bellevue, WA 98004	<input type="checkbox"/> Overnight Express
	<input type="checkbox"/> By Fax

Bruce L. Turcott, AAG	<input checked="" type="checkbox"/> U.S. Mail
Licensing & Administrative Law	<input type="checkbox"/> State Campus Mail
PO Box 40100; MS: 40100	<input type="checkbox"/> Hand Delivered
Olympia, WA 98504-0100	<input type="checkbox"/> Overnight Express
	<input type="checkbox"/> By Fax

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of August, 2007, in Olympia, Washington.



JANET L. OLSON, Legal Assistant